IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: May 2, 2007)

DO NOT PUBLISH

JAMES ROBERT DICKMAN, as legal representative of the estate of his daughter, LINDSAY KATHLEEN DICKMAN,	)	
Petitioner,	)	
v.	)	No. 06-0199V
	)	Decision on the Record;
SECRETARY OF HEALTH AND HUMAN SERVICES,	)	Dismissal
Respondent.	)	

DECISION[1]

Petitioner, James Robert Dickman (Mr. Dickman), as legal representative of the estate of his daughter, Lindsay Kathleen Dickman (Lindsay), seeks compensation under the National Vaccine Injury Compensation Program (Program).[2] In a petition that he filed on March 13, 2006, Mr. Dickman alleges that Lindsay died on April 25, 2004, from injuries that she sustained following the administration of several vaccines on March 14, 2003. *See* Petition (Pet.) ¶¶ 6-7, 10. According to Mr. Dickman, Lindsay began to cry "constantly" and became "inconsolable" on March 15, 2003. Pet. ¶ 8; *but see* Petitioner's exhibit (Pet. ex.) 10, ¶¶ 3-4, 11 (recounting that symptoms occurred on March *14*, 2003). Then, according to Mr. Dickman, Lindsay "experienced her first chronic seizure"

[1] As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" will be available to the public. *Id.*

[2] The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

on March 23, 2003. Pet. ¶ 9; *see also* Pet. ex. 10, ¶¶ 5-6 (recounting that Lindsay entered Toledo Children's Hospital on March 23, 2003, after exhibiting two episodes of "drooling" and "staring to the right," accompanied by silence).[3]

The Act permits Mr. Dickman to establish causation by pursuing two distinct legal theories. First, Mr. Dickman can present what is commonly referred to as a Table case. The Act contains the Vaccine Injury Table (Table) that lists vaccines covered by the Act and certain injuries and conditions that may stem from the vaccines. *See* § 300aa-14; 42 C.F.R. § 100.3(a). If Mr. Dickman demonstrates by the preponderance of the evidence that following the administration of Lindsay's March 14, 2003 vaccinations, Lindsay suffered the onset of an injury listed on the Table for one of the vaccines, within the time period provided by the Table for the injury, Mr. Dickman is entitled to a presumption that the vaccine caused Lindsay's injury. §§ 300aa-11(c)(1)(C)(I); 300aa-13(a)(1)(A).[4] Respondent may rebut the presumption of causation if respondent demonstrates by the preponderance of the evidence that Lindsay's injury was "due to factors unrelated to the administration of" a vaccine. § 300aa-13(a)(1)(B); *Knudsen v. Secretary of HHS*, 35 F.3d 543 (Fed. Cir. 1994).

In the alternative, Mr. Dickman can present a case based upon traditional tort standards. *See, e.g.*, § 300aa-11(c)(1)(C)(ii)(I). While "[t]he Act relaxes proof of causation for injuries satisfying the Table," the Act "does not relax proof of causation in fact for non-Table injuries." *Grant v. Secretary of HHS*, 956 F.2d 1144, 1148 (Fed. Cir. 1992). The simple temporal relationship between a vaccination and an injury, and the absence of other obvious etiologies for the injury, are patently insufficient to prove actual causation. *See Grant*, 956 F.2d at 1148; *Wagner v. Secretary of HHS*, No. 90-1109V, 1992 WL 144668 (Cl. Ct. Spec. Mstr. June 8, 1992). To prevail under an actual causation theory, Mr. Dickman must demonstrate by the preponderance of the evidence that (1) "but for" the administration of Lindsay's March 14, 2003 vaccinations, Lindsay would not have been injured, and (2) the administration of Lindsay's March 14, 2003 vaccinations was a "substantial factor in bringing about" Lindsay's injury. *Shyface v. Secretary of HHS*, 165 F.3d 1344, 1352 (Fed. Cir. 1999).

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[3] Lindsay's medical records establish that Lindsay's first seizures prompting hospitalization at Toledo Children's Hospital occurred on March 29, 2003, *see, e.g.*, Pet. ex. 7 at 157, *not* March 23, 2003, as Mr. Dickman seemingly recalls. *See* Pet. ¶ 9; Pet. ex. 10, ¶¶ 5-6.

[4] The preponderance of the evidence standard requires the special master to believe that the existence of a fact is more likely than not. *See, e.g.*, *Thornton v. Secretary of HHS,* 35 Fed. Cl. 432, 440 (1996); *see also In re Winship,* 397 U.S. 358, 372-73 (1970) (Harlan, J., concurring), *quoting* F. James, CIVIL PROCEDURE 250-51 (1965). Mere conjecture or speculation will not meet the preponderance of the evidence standard. *Snowbank Enter. v. United States,* 6 Cl. Ct. 476, 486 (1984); *Centmehaiey v. Secretary of HHS*, 32 Fed. Cl. 612 (1995), *aff'd*, 73 F.3d 381 (Fed. Cir. 1995).

The actual causation standard requires Mr. Dickman to adduce "a medical theory," supported by "[a] reliable medical or scientific explanation," establishing "a logical sequence of cause and effect showing that the vaccination was the reason for the injury." *Grant*, 956 F.2d at 1148; *see also Knudsen*, 35 F.3d 543, 548 (Fed. Cir. 1994)(citing *Jay v. Secretary of HHS*, 998 F.2d 979, 984 (Fed. Cir. 1993)); *Althen v. Secretary of HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005); *Capizzano v. Secretary of HHS (Capizzano III)*, 440 F.3d 1317 (Fed. Cir. 2006). "The analysis undergirding" the medical or scientific explanation must "fall within the range of accepted standards governing" medical or scientific research. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995). Mr. Dickman's medical or scientific explanation need not be "medically or scientifically certain." *Knudsen*, 35 F.3d at 549. But, Mr. Dickman's medical or scientific explanation must be "logical" and "probable," given "the circumstances of the particular case." *Knudsen*, 35 F.3d at 548-49.

Under either a Table theory or an actual causation theory, Mr. Dickman must demonstrate by the preponderance of the evidence that Lindsay's death was the sequela, acute complication, or pathological consequence of Lindsay's injury to receive the Act's $250,000.00 death benefit. *See* § 300aa-15(a)(2).

Congress prohibited special masters from awarding compensation "based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion." § 300aa-13(a). Numerous cases construe § 300aa-13(a). The cases reason uniformly that "special masters are not medical doctors, and, therefore, cannot make medical conclusions or opinions based upon facts alone." *Raley v. Secretary of HHS*, No. 91-0732V, 1998 WL 681467, at *9 (Fed. Cl. Spec. Mstr. Aug. 31, 1998); *see also Camery v. Secretary of HHS*, 42 Fed. Cl. 381, 389 (1998).

Mr. Dickman did not proffer with his petition any of the documents required by § 300aa-11(c)(1) & (2) and by Vaccine Rule 2(e). Thus, the special master monitored initially the factual development of the case. *See, e.g.*, *Dickman v. Secretary of HHS*, No. 06-0199V, Order of the Special Master (Fed. Cl. Spec. Mstr. Mar. 16, 2006); *Dickman v. Secretary of HHS*, No. 06-0199V, Order of the Special Master (Fed. Cl. Spec. Mstr. Apr. 6, 2006); *Dickman v. Secretary of HHS*, No. 06-0199V, Order of the Special Master (Fed. Cl. Spec. Mstr. May 5, 2006); *Dickman v. Secretary of HHS*, No. 06-0199V, Order of the Special Master (Fed. Cl. Spec. Mstr. June 15, 2006). Then, the special master directed the medical development of the case. *See, e.g.*, *Dickman v. Secretary of HHS*, No. 06-0199V, Order of the Special Master (Fed. Cl. Spec. Mstr. July 21, 2006); *Dickman v. Secretary of HHS*, No. 06-0199V, Order of the Special Master (Fed. Cl. Spec. Mstr. Sept. 12, 2006); *Dickman v. Secretary of HHS*, No. 06-0199V, Order of the Special Master (Fed. Cl. Spec. Mstr. Oct. 11, 2006); *Dickman v. Secretary of HHS*, No. 06-0199V, Order of the Special Master (Fed. Cl. Spec. Mstr. Feb. 27, 2007).

Mr. Dickman moves now for a judgment on the record. *See* Motion for Judgment on the Record (Motion), filed April 27, 2007. Mr. Dickman represents that he "does not feel that at this point in time he can prove causation" under either a Table theory or an actual causation theory, because "he cannot at this point in time produce an expert affidavit or report in support of causation

in his case." Motion at 1. Mr. Dickman understands obviously that his Motion will result in an adverse ruling on entitlement. *See generally id.* As a consequence, Mr. Dickman waives "entry of a long and/or detailed decision." Motion at 1.

The special master has canvassed thoroughly the record as a whole. He determines that Lindsay's medical records alone do not establish more likely than not either a Table claim or an actual causation claim. And, as Mr. Dickman concedes, the special master determines that Mr. Dickman has not proffered a reliable medical opinion demonstrating either a Table claim or an actual causation claim. *See* Motion at 1. Thus, in *granting* Mr. Dickman's Motion, the special master is constrained to conclude "on the Record as it stands" that Mr. Dickman is not entitled to Program compensation. Motion at 1.

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition.

The clerk of court shall send Mr. Dickman's copy of this decision to Mr. Dickman by overnight express delivery.

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John F. Edwards
Special Master